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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-879

HEUBLEIN, INC., APPELLANT

v.

SOUTH CAROLINA TAX COMMISSION

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of February 29, 1972, inviting the Solicitor General to express the views of the United States.

1. Appellant, a Connecticut corporation engaged in the manufacture of alcoholic beverages in that State, seeks review and reversal of the judgment of the Supreme Court of South Carolina upholding the imposition upon it of an apportioned state income tax (and a license tax, liability for which depends upon liability for the income tax). Appellant does not question the apportionment formula employed, but asserts that South Carolina is without power to tax its income, invoking

the provisions of P.L. 86-272, 15 U.S.C. 381 (set forth at J.S. 30-32). That statute, in brief, provides that no State shall have power to impose a net income tax upon income derived from interstate commerce if the only business activities within such State by or on behalf of the taxable person are limited to the solicitation of orders sent outside the State for approval or rejection and, if approved, filled by shipment or delivery from a point outside the State. The statute was enacted in response to this Court's decision in *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, and to the suggestions contained in the opinion therein (p. 457) and in earlier opinions[1] that it lay within the power of Congress to determine when, and to what extent, interstate commerce, or income therefrom, should be subject to state taxation. S. Rep. No. 658, 86th Cong., 1st Sess., 2-3; H. Conf. Rep. No. 1103, 86th Cong., 1st Sess.

2. To appraise appellant's activities within South Carolina in terms of P.L. 86-272, it is necessary first to examine the regulatory setting within which they took place.

Pursuant to explicit authorization contained in Art. 8, Section 11 of the Constitution of South Carolina, the Alcoholic Beverage Control Act[2] of that State provides comprehensive and detailed regulation of liquor traffic. Enforcement and administrative control

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[1] See, *e.g., Northwest Airlines* v. *Minnesota,* 322 U.S. 292, 298, 303-304.

[2] Code of Laws of South Carolina (1962, as amended), Title 4, Chapter 1, Sections 4-1 through 4-150.

were, until 1967, vested in the South Carolina Tax Commission (§§ 4-5, 4-5.1, 4-6), and, since 1967, have been vested in the then created South Carolina Alcoholic Beverage Control Commission ("the Control Commission") (§§ 4-27—4-27.8). Manufacturers, wholesalers, and retailers must be separately licensed under statutory provisions relating to eligibility, location, number of licenses, and financial responsibility, with licenses limited in duration and subject to suspension or revocation (§§ 4-31—4-60). Maximum prices by retailers and wholesalers are established in terms of permissible mark-ups (§ 4-72). Terms and methods of sale by wholesalers (§§ 4-72.1—4-73.2), and by retailers (§§ 4-78—4-83) are established. Storage by wholesalers is controlled (§§ 4-74). Records of the movement of stocks of liquor are maintained by requirements that copies of invoices of liquors received (§ 4-75) and sold (§ 4-76) by wholesalers must be filed with the Control Commission within 24 hours after receipt or sale, supplemented by monthly statements of stocks on hand (§ 4-77).

Alcoholic beverages produced outside the State of South Carolina are specifically dealt with by Sections 4-131 through 4-150 of the Alcoholic Beverage Control Act, as amended (set forth at J.S. 32-40). No person other than a registered producer may ship or move alcoholic liquors from any point outside to a point inside South Carolina (§ 4-134). A producer may register with the Control Commission by filing prescribed forms (§ 4-136), must register brands to be shipped or moved into the State (§ 4-137), and may ship or move

into the State only brands so registered (§ 4-135). A registered producer must register a producer representative, who must be a resident of South Carolina (§ 4-131(3)) not having any direct or indirect interest in a wholesale or retail liquor business in South Carolina (§ 4-139).

Shipments of liquor into South Carolina may be made only to the registered producer in care of the producer representative (§ 4-141). Prior to shipment into the State, the producer must mail to the Control Commission a complete invoice showing in detail the items of the shipment by quantity, brand, price, etc., the point of origin and the point of destination of the shipment, and also, prior to or at the time of shipment, a copy of the bill of lading (§ 4-142). Immediately upon acceptance of delivery of the shipment, the producer's representative must furnish the Control Commission with a copy of the invoice showing the date, time, and place the delivery was accepted (§ 4-142). Such shipments, when received, must be stored in a licensed warehouse of the registered producer (§§ 4-140, 4-141), or, after delivery is complete, may be shipped to a duly licensed wholesaler (§ 4-141). Prior to shipment to a wholesaler, however, the producer's representative must seek, on prescribed forms, and obtain from the Control Commission, permission to make the shipment (§ 4-141). Prior to shipment to the wholesaler, the producer's representative must also mail the Control Commission a complete and detailed invoice covering the proposed shipment, showing the name and address of the consignee (§ 4-143). In addition to these controls, a registered producer has, since 1967, been

required to certify (subject to revocation of registration for violation) that it will not wilfully sell any alcoholic liquors of a particular brand and proof in any State of the United States at a price lower than the price to licensed South Carolina wholesalers (§ 4-137.1). Cf. *Seagram & Sons* v. *Hostetter*, 384 U.S. 35.

3. There appears to be no basis for questioning South Carolina's authority under the Twenty-first Amendment thus to control and localize the movement, distribution, and sale of alcoholic beverages, whether produced within or without the State. *State Board* v. *Young's Market Co.*, 299 U.S. 59. As this Court pointed out in *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330:

> This Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders. * * *

And the Court added in *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341, 346:

> There can surely be no doubt, either, of [a State's] plenary power to regulate and control, by taxation or otherwise, the distribution, use, or consumption of intoxicants within her territory after they have been imported. * * *

South Carolina's controls over liquor produced in other states are of a piece with the controls over liquor

produced within the State.[3] The maintenance of authorized channels for movement would be more difficult, and diversion facilitated, if out-of-state liquor could be shipped directly to local users or distributors. Cf. *Duckworth* v. *Arkansas*, 314 U.S. 390; *Carter* v. *Virginia*, 321 U.S. 131; *Gordon* v. *Texas*, 355 U.S. 369. The requirement that a resident representative, registered with the Control Commission, be appointed to receive shipments of liquor into the State, and to sell and deliver them only with the consent of the Commission, not only is integral to the system of controls but also makes the out-of-state producer and shipper more amenable to the authority of the State. Cf. *Union Brokerage Co.* v. *Jensen*, 322 U.S. 202.

4. Appellant acknowledges (R. 9-10) that it has complied with the South Carolina Beverage Control Act by appointment of an employee as its registered representative resident in South Carolina, by shipping goods to him, and by his delivery of goods thus received in South Carolina to wholesalers in that State. In doing so, it has localized its business in the State, and has exceeded the minimal activities that are the predicate for the operation of P.L. 86-272. "The provisions of subsection (a) of Section 1 of the bill will not be available to grant immunity to a person where the orders are filled by a shipment or delivery from a stock of goods, warehouse, plant, or factory maintained by the person

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[3] In liquor regulation, this non-discriminatory pattern is not constitutionally required. *State Board* v. *Young's Market Co.*, *supra*; *Indianapolis Brewing Co.* v. *Liquor Control Comm.*, 305 U.S. 391.

within the State." S. Rep. No. 658, 86th Cong., 1st Sess., 6-7.

The line drawn by the federal statute between direct shipment to the purchaser from an out-of-state stock of goods and delivery from goods held by the seller within the state is not a novel or an unfamiliar one. It parallels the decisions of this Court in "the long line of so-called 'drummer cases' " (*Nippert* v. *Richmond*, 327 U.S. 416, 417) where state or local licensing authority was in question. If delivery was made from goods held by the seller within the state, a license could be required. *Wagner* v. *City of Covington*, 251 U.S. 95; *Dalton Adding Machine Co.* v. *Virginia*, 246 U.S. 498. But if orders were solicited to be filled by direct shipment to the purchaser from an out-of-state stock of goods, then the demands of an open market for interstate commerce placed the activity beyond the licensing authority of state or local government. *Nippert* v. *Richmond, supra; Robbins* v. *Shelby County Taxing District*, 120 U.S. 489.

It may be true that appellant conducts its business in South Carolina in such a fashion as to localize it there only because the State, pursuant to its authority under the Twenty-first Amendment, so requires, if appellant chooses to do any business in the State. But, if so, that hardly furnishes reason to expand the application of P.L. 86-272 beyond its terms and the factual situations considered in its legislative history, and to apply it on a contrary-to-fact or might-have-been basis. Where there is federal authority, statutory or constitutional, for a state to control and localize a business that might otherwise assert the immunities appropriate to inter-

York and Oregon Bars entitled "Crystal Gazing: Legislative History in Action," 47 ABAJ 466 (May 1961), warns us at page 472:

> "Far better would it be for the courts to accord to legislature and executive the respect due to coordinate departments, to accept laws as passed according to their own words, the careful crystalization of study, preparation, drafting, debating, redrafting and final enactment.
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> "A law is what it says, not the raw clay of which it was sculptured."

The Conference Report (No. 1103) on P.L. 86-272 states:

> "Both the House and Senate bills contain a minimum activities approach to the problem of State taxation of income from interstate commerce. It was the purpose of both Houses to specifically exempt, from State taxation, income derived from interstate commerce where the only business activity within the State by the out-of-State company was *solicitation.* * * *" (Emphasis added.)

"Solicitation" is the act of soliciting, or, as the dictionary states: "To endeavor to obtain by asking or pleading * * *" (Webster's New International Dictionary, Second Edition (Unabridged)). What is plead for? The statute clearly requires that the *orders* be solicited *and it is the orders which are thus solicited* which are sent outside of the state and which are filled by shipment or delivery from a point outside the state.

The use of the word "which" in the phrase "which orders are sent outside the state," etc., in the statute clearly ties in the orders solicited with the orders to be sent outside the state and filled outside the state. Where the solicitation is for orders to be filled from within the state, there is no exemption.

In order to circumvent the literal application of the language employed by Congress to the facts and circumstances of this case, the appellant contends that there is a substance to Public Law 86-272 which permits an ignoring of its express terms, not only in what constitutes "solicitation" but also in reference to what constitutes an "interstate" sale. Public Law 86-272 is addressed solely to interstate sales. The operative effect of the ABC law and of the appellant's activities in compliance therewith placed the sales in question in the category of intrastate sales as contrasted from interstate sales. Heublein's activities do not constitute mere "solicitation of orders".

Thus, appellant is contending, in the instant case, for (1) an extremely loose interpretation of Public Law 86-272, an interpretation which is contrary to the express terms of that statute; and (2) an equally loose application and interpretation of the facts. This approach is contrary to numerous decisions of this Court which require exemption statutes to be strictly construed and place upon the party claiming an exemption a distinct burden of proof. This requirement is particularly important where there is involved the interpretation and application of local law and the possible overruling of the findings and conclusions of a state supreme court.

C. Heublein's Activities in South Carolina Exceeded Permitted Activity Under Public Law 86-272.

As heretofore indicated, Heublein's representative in South Carolina engaged in extensive promotional activities for the purpose of consummating intrastate sales of alcoholic beverages on behalf of Heublein. In doing so, he was conforming with the requirements of the ABC law. As indicated by the Solicitor General in

his Amicus Curiae Memorandum, the terms of Public Law 86-272 do not include such promotional activities.

Additionally, Heublein's representative maintained an office in his home (Appendix 16). This Court, in *General Motors Corp. v. Washington, supra*, 377 U.S. 436, 12 L. Ed. 430, 84 S. Ct. 1564 (1964), commented that the use of a home as an office served the corporation "just as effectively" as other offices. The legislative history of Public Law 86-272 convincingly demonstrates that Congress did not intend to exempt a corporation maintaining an office in a state. The original bill would have permitted the maintenance of an office; this was deleted, and the clear intention of Congress remains to deny exemption if there is an office. See Beaman, "Paying Taxes to Other States" (1963), Chapter 6-15; Appendix B-6. This "home" office, together with the office maintained at the distributor's office (Ben Arnold Company) (Appendix 13) clearly takes Heublein outside the protection of Public Law 86-272.

Thus, Heublein's representative did not restrict his activities to solicitation of orders to be accepted out of state and filled "by shipment or delivery from a point outside the State". Rather, he did whatever was necessary for Heublein to establish, to maintain, and to hold the market for the retail, intrastate sale of its products in South Carolina.

In substance, Heublein argues that the activities of its representative in South Carolina did not exceed the activities which are exempt under Public Law 86-272 because these activities were required by the liquor regulatory measures of South Carolina. This is a *non sequitur*. It does not change either (1) the nature or extent of the appellant's activities within South Carolina or (2) the scope of the exemption and preference

granted by Public Law 86-272. We agree with the Solicitor General that the fact that the state of South Carolina has jurisdiction under the Twenty-First Amendment to require certain things to be done in South Carolina to carry on a liquor business furnishes no reason "to expand the application of P.L. 86-272 beyond its terms and the factual situations considered in its legislative history, and to apply it on a contrary-to-fact or might-have-been basis" (Br. of Solicitor General 7).

We also agree with the position of the Solicitor General that South Carolina's liquor control laws and the decision below do not threaten to render ineffective the protection afforded by Public Law 86-272 to other interstate businesses. It is absurd for appellant to contend that this Court's decision in favor of the state of South Carolina in this case would permit the extension of the applicability of the Twenty-First Amendment to businesses other than alcoholic beverage businesses.

Firstly, the promotional activities of Heublein's representative in South Carolina are in excess of activities required to meet the ABC law. Secondly, even if those activities did not exceed those requirements, the Twenty-First Amendment pertains to alcoholic beverage control and to alcoholic beverage control only. Thirdly, had Congress intended for Public Law 86-272 to immunize activities such as Heublein's from the tax jurisdiction of the state, Congress could easily have so provided by means of specific wording to that effect. It did not do so, even though the Twenty-First Amendment and the ABC law already were in effect. Finally, the business decision to comply with the requirements of the ABC law, prior to the enactment of Public Law 86-272, is no different than any other decision as to

how a business is to be conducted in a state, which decision carries with it its own tax consequences.

We do not agree with the inference in the appellant's brief that the South Carolina ABC law was designed to circumvent the otherwise applicable exemption provisions of Public Law 86-272. The ABC law was enacted prior to Public Law 86-272. It is therefore reasonable to assume that the State of South Carolina was concerned about control and management of the liquor traffic in South Carolina and was not concerned about income tax jurisdictional problems.

Nor do we find any merit in the appellant's contention that, were it not for the Alcoholic Beverage Control Act requirements of South Carolina, Heublein would do business in South Carolina in a manner as to be exempt under Public Law 86-272. This is pure conjecture on the part of appellant. It is not relevant to proceed in this case on the assumption that certain of appellant's activities in South Carolina were dictated solely by South Carolina liquor laws.

The enactment of the South Carolina ABC law in 1958 required Heublein to make a business decision. Heublein had to decide whether the South Carolina market was sufficiently profitable to justify Heublein's continuing to do business in that state. That decision was affirmative. It was affirmative despite the absence of Public Law 86-272. Heublein should not now be permitted, in the face of such facts, to speculate, to its own advantage, that Public Law 86-272, enacted in 1959, somehow has resulted in Heublein's continuing to abide by that 1958 business decision. The law and facts must be accepted as they are, and appellant should not be permitted to surmise as to the hypothetical effect of a change in either.

D. The Applicable Case Law Supports The Position Of South Carolina And The Solicitor General.

The scope of the exemption and of the immunity granted by Public Law 86-272 has been before the Supreme Court of Oregon on several occasions; and it has been considered by the Supreme Court of New Jersey in the recent case of *Clairol, Inc. v. Kingsley*, 109 N. J. Super. 22, 262 A.2d 213, aff. per curiam, 57 N. J. 199, 270 A.2d 702, appeal dismissed 402 U.S. 902 (1970). The most recent Oregon case is *Herff Jones Co. v. State Tax Commission*, 247 Or. 407, 430 P.2d 998 (1967), which limited the application of an earlier Oregon case, *Smith Kline & French v. Tax Com.*, 241 Or. 50, 403 P.2d 375 (1965). The principal question in the Oregon and New Jersey cases was what is to be included within the term "solicitation" as used in Public Law 86-272. The Supreme Court of Oregon, in the earlier *Smith Kline & French* case, *supra*, had given a broad interpretation to the word "solicitation". In substance, it overruled that interpretation in *Herff Jones Co., supra. Clairol*, in turn, followed the narrow interpretation of *Herff*.

Appellant here contends for a broad interpretation of the word "solicitation" and ignores the fact that that this case involves solicitation *and promotion* of *intrastate* sales, rather than of interstate sales.

Proper rules of statutory construction require a strict interpretation of the exemption granted by Public Law 86-272. The strict interpretation of the language by the Courts in *Clairol* and *Herff* is proper and supports the position of South Carolina in this cause. The Supreme Court of New Jersey noted in *Clairol* that

> "the primary function of Clairol's detailmen and other representatives in New Jersey is to pro-

mote the public's purchase and use of its products. To accomplish that purpose, its salaried cosmetics detailmen assigned to visit retail druggists do so at regular intervals."

This is the primary function of the appellant's representative in South Carolina. The New Jersey Supreme Court rejected the argument that such activity could be characterized as solicitation of orders for sales in interstate commerce.

Likewise, the Supreme Court of Oregon, in *Herff Jones Co. v. State Tax Commission, supra*, 247 Or. 407, 430 P.2d 998 (1967) declined to include in solicitation the collection of deposits and balances due on ordered merchandise. In holding that such in-state activity was not part of solicitation, The Oregon Supreme Court stated:

> "This court's decision in *Smith Kline & French v. Tax Com.*, supra, might be considered to have placed a broad interpretation on the word 'solicitation' as it is used in P.L. 86-272, and plaintiff's sales representatives' activities might well be considered no more than solicitation if such were the case. But, in *Cal-Roof Wholesale v. Tax Com.*, 242 Or. 435, 410 P.2d 233 (1966), this court expressly rejected such an interpretation. In that case we stated through Mr. Justice Schwab, p. 447:
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> " 'In any event, the tax commission's analysis of our decision in *Smith Kline & French v. Tax Com.*, 241 Or. 50, 403 P.2d 375, as a "broad" interpretation "of solicitation" as the word is used in Public Law 86-272, is not warranted. Without mentioning the terms "inter" or "intra," Public Law 86-272 prohibits the imposition of a state tax on income.
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> " ' " * * * if the *only business activities* * * * within such state * * * are * * * (1) the solicitation of orders by

such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1)." ' (Italics supplied.)

"Therefore, it seems clear that in order to come within the purview of P.L. 86-272 the *only* business activity which plaintiff's sales representatives could engage in is the solicitation of orders. It is abundantly clear from the record that the representatives do more than this. Aside from the actual solicitation of orders, the salesmen also collect an initial deposit on merchandise ordered, and forward such deposits to plaintiff. The sales representatives on occasion also collect the balance due on the merchandise when it is delivered to a school. The sales representative may also do occasional collection work for plaintiff in order to prevent their own commissions from being reduced." (247 Or. 411-412)

If, as contended by appellant, Public Law 86-272 is not concerned with technicalities, we wonder with what it is concerned. It is not concerned with any comprehensive legislation concerning state and local taxation of interstate commerce. This is indicated by the history of Public Law 86-272.

Public Law 86-272 was hurriedly enacted by Congress after limited hearings before the Select Committee on Small Business of the United States Senate[3] and

[3]State Taxation on Interstate Commerce—1959, *Hearings before the Select Committee on Small Business, United States Senate,* Eighty-

the Committee on Finance of the United States Senate[3]

Public Law 86-272 not only defined the above referred to jurisdictional prerequisites, but also made provision for congressional study of the problem of state taxation of interstate commerce. This constitutional authorization has led to the creation of a Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary, House of Representatives, which has conducted hearings on various aspects of the problems. The first series of hearings took place December 4 through 8, and December 11 through 13, inclusive, 1961.[4]

On June 15, 1964, this Special Subcommittee issued the first two volumes of its report.[5] Much of the material in these volumes indicate the continued existence of the problems involved in the state taxation of interstate commerce and note the artificial and limited scope of the provisions of P.L. 86-272.

Appellant, in its effort to bring itself within the immunity of Public Law 86-272, attributes entirely too much to this temporary legislation. To go beyond its language and to characterize the South Carolina decision as leading to "complete frustration of Congressional income tax policy" (App. Br. 26) is of little help when the arbitrary and temporary nature of the

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Sixth Congress, First Session, April 8, 1959, Part 1; May 1, 1959, Boston, Mass., Part 2; and June 19, 1959, Part 3.

[3]State Taxation of Interstate Commerce, *Hearings before the Committee on Finance, United States Senate*, Eighty-Sixth Congress, First Session, July 21 and 22, 1959.

[4]"State Income Taxation of Mercantile and Manufacturing Corporations", *Hearings before the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary, House of Representatives*, Eighty-Seventh Congress, First Session, December 4, 5, 6, 7, 8, 11, 12, and 13, 1961, Serial No. 20 (hereinafter referred to as the "Special Subcommittee").

[5]"State Taxation of Interstate Commerce", *Report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary, House of Representatives*, Pursuant to Public Law 86-272, as amended, Volumes 1 and 2.

legislation is considered. The temporary preference and immunity which it accords to certain interstate business under its specific terms in no way implies that it should be broadened to encompass "a business location" test (App. Br. 14) or to include activities which might be considered to be on a par with or even less significant than solicitation of interstate orders. We agree with the Solicitor General that Congress addressed this legislation to "drummer" sales activity (Solicitor General's Br. 7). In the instant case it is the wisdom of Congress and its role that must control. For the appellant to argue that Public Law 86-272 is not concerned with the technicalities of determining place of sale or passage of title and yet is concerned with the technicalities of where and how an order is accepted is totally inconsistent.

We note that for most of the period in question all sales were to one distributor, but that technical compliance with acceptance of the orders outside the state purportedly governed each and every sale, and a technical credit check was made on this one distributor as to each order (Appendix 26). It is no surprise that in no instance was any order rejected (Appendix 19, 27). In substance, appellant is claiming protection from the technicality of Public Law 86-272 and at the same time refuting such technicality in order to extend and reinterpret the law's requirements. It is technical legislation and should be so treated. There is no reason why the appellant's activities in South Carolina should be immune from the properly apportioned nondiscriminatory income tax law of South Carolina.*

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*As indicated in their brief amicus curiae filed on behalf of a number of states in *International Shoe Co. v. Cocreham*, 246 La. 244, 164 So. 2d 314 (1964) certiorari denied 379 U.S. 902 (1965), the states are well aware of the defects and limitations of Public Law 86-272. That brief asserted the unconstitutionality of Public Law 86-272 on the basis of several arguments including the contention that the criteria

E. Specific Additional Response To The Brief Of The Appellant.

The appellant's argument in this cause is circuitous and confusing. For this reason it is believed important to specifically analyze its nature and content.

By fragmenting and discussing separately its activities in the state of South Carolina, and by fragmenting and discussing separately the requirements of Public Law 86-272 in such a manner as to conclude that Heublein is entitled to an exemption, appellant would lead this Court to believe that its activities are protected by Public Law 86-272. As a further fragmentation of its factual picture, appellant would have subtracted, from its total activity in South Carolina activity it attributes to the ABC law. This fragmented approach to the facts and the requirements of Public Law 86-272 is not justified. The *total* of the appellant's activities in South Carolina must be applied against the *total* requirements of Public Law 86-272.

Appellant further argues that the purpose of Public Law 86-272 was to "protect a businessman who shipped from a stock of goods maintained outside of the state, leaving unprotected those who maintain their stocks in the state." (App. Br. 14.) As a matter of fact, the statute employs no such test. In order to be protected by the statute, the activity must be subject to characterization as "the solicitation of orders" by any person from interstate commerce.

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employed to separate immune from taxable activity were highly artificial and had previously been rejected by this Court in deciding interstate commerce state tax questions.

No constitutional question has been raised in the instant Heublein case. Inasmuch as Public Law 86-272 has no application here, we believe the constitutional question cannot properly be reached. Futhermore, there is some indication by this Court's denial of certiorari in the *International Shoe* case, *supra*, and its dismissal of appeal in *Clairol*, *supra*, that this Court might be inclined to uphold the constitutionality of Public Law 86-272 if the question of constitutionality were properly raised.

In arguing, on pages 9-23 of its brief under the heading "Heublein's Activities in South Carolina Do Not Remove It From The Protection Of Public Law 86-272", appellant classifies its activities as the solicitation of orders in South Carolina (App. Br. 10). Yet, on page 6 of its brief, appellant claims that the producer-representative did not take any orders. Obviously, if he did not take any orders his activities could not be that of the solicitation of orders.

The quotation on pages 11 and 12 of the appellant's brief from the dissent in *Northwestern Cement Co. v. Minn.*, 358 U.S. 450, is irrelevant. The history of congressional involvement in the field of state and local taxation since the enactment of Public Law 86-272, referred to by appellant on pages 12-14 of its brief is likewise of no import here. These references are smoke screens used by appellant to cloud the effect of the language employed by Congress in the enactment of Public Law 86-272 and to confuse this Court as to the manner in which that language should be applied to the uncontroverted facts in this cause. Such references are made apparently with the object of establishing that Congress has employed a "business location" rather than a "business activity" test in Public Law 86-272. This contention is not supportable by the history of Public Law 86-272 which shows that Congress specifically rejected this latter test.

In making the "business location" argument, Heublein relies on the phrase "shipment * * * from a point outside the State" and assumes that any shipment across state lines, even though the title and risk are retained by the seller until after the property is located within the state, is an interstate sale which is protected by Public Law 86-272. As a matter of fact, the sales were intrastate and all the legal consequences

that flow from this fact exist as to these sales. The shipments from out-of-state were made to Heublein's representative in South Carolina. Subsequently, after the goods reached South Carolina and while they were still owned and possessed by Heublein through its representative, that representative transferred them within South Carolina to Heublein's customers. These are intrastate sales and not interstate sales. The shipment with which Public Law 86-272 is concerned is the transfer from an out-of-state seller to an in-state buyer in "interstate commerce" and not a shipment which is "intrastate" in nature. Thus, it is irrelevant for the purpose of characterizing Heublein's in-state activities that its alcoholic beverages were delivered to the wholesaler's place of business in South Carolina rather than to Heublein's own warehouse prior to the transfer of title and sale in South Carolina. The absence of a South Carolina warehouse does not change the intrastate nature of the sales transactions.

The statement on page 17 of the appellant's brief that "* * * The plain language of the statute demonstrates that Public Law 86-272 is concerned with the physical location of goods when ordered and shipped in interstate commerce, and not with the technicalities of determining place of sale or passage of "title." is without foundation. The delivery was made to Heublein's customers from a stock of goods located in the state. This is the operative effect of the ABC law, and the technical requirements of delivery and passage of title with which the appellant complied.

Recognizing that as a matter of technical law we are here concerned with in-state sales and deliveries, the appellant next argues that the in-state transfer of title and delivery is only a "documentary formality" and should give way to "substantive requirements."

Appellant argues that the requirements of the ABC law is a mere formality and did not change its pattern of activity within the state of South Carolina. This argument leaves as a useless appendage to its brief its argument on pages 23-32 that South Carolina's regulatory laws and the requirements of the Twenty-First Amendment can and should be completely ignored in determining either the operative effect of Public Law 86-272 or the controlling facts in this cause.

Appellant contends that, although the ABC law requires physical delivery to Heublein's representative in South Carolina and then redelivery from him to the wholesaler, actual practice allows Heublein to treat such delivery as only a paper transaction. Appellant then derides the paper transaction as a mere technicality which does not destroy Heublein's immunity under Public Law 86-272. In so doing, appellant ignores the fact that the ABC law, however lightly obeyed in practice accomplishes its purposes of controlling the importation of liquor into the state of South Carolina. A taxpayer's success in using shortcuts to comply with the law should not be accepted as a basis for ignoring the purpose and effect of that law or the legal significance of the steps required to be taken. Heublein may use the shortcut method as a shield against any charge that it failed to comply with the ABC law of South Carolina; but it cannot use that practice as a sword to attack the true legal consequences of compliance with the ABC law.

Heublein is present in South Carolina in the form of its representative there. Through him Heublein owned and possessed, even if only momentarily, every ounce of alcoholic beverages which was purchased from Heublein by anyone in the state of South Carolina

during the years in question. That ownership and possession plus subsequent transfer to the wholesaler subjected Heublein to the corporate income tax jurisdiction of South Carolina. Here, compliance with the legal requirements constitutes more than mere form; it constitutes the substance of what appellant in fact does in South Carolina.

We concur with the appellant's assertion on page 27 of its brief "* * * that the Twenty-First Amendment simply does not deal with state taxing power. * * *" This is not a Twenty-First Amendment problem, and the effect of the Twenty-First Amendment should be given no consideration by this Court. This does not mean, however, that the activities that are required of the appellant in the state of South Carolina as a result of state legislation concerning the Twenty-First Amendment are irrelevant or immaterial.

III.

SUMMARY AND CONCLUSION

As indicated herein, it is the position of the Multistate Tax Commission that Public Law 86-272 is a technical statute dealing with an income tax exemption for multistate businesses conducting a limited activity within a state. A statute of this nature should be strictly construed against the person claiming exemption and immunity from state and local income tax laws and should be strictly construed in favor of the jurisdiction of the states to impose a nondiscriminatory properly apportioned net income tax on a multistate business, such as Heublein. Furthermore, there should not be carved out of otherwise taxable activity, activity which Heublein would attribute to

the compliance with the Alcoholic Beverage Control Act of South Carolina.

Application of these basic principles clearly establish that Heublein's activities in South Carolina subject it to the income tax jurisdiction of South Carolina and are without the protective umbrella of Public Law 86-272. Heublein did in fact carry on activity in the state of South Carolina that could not be characterized as the solicitation of orders for sales from interstate commerce. No interstate sales were solicited by Heublein's representative in South Carolina. Heublein's activities in South Carolina were of an institutional nature designed to establish and maintain its position in the alcoholic beverage market in South Carolina. The reasons why Heublein has chosen to carry on activities which create tax liability are wholly irrelevant. The fact is Heublein does do business in South Carolina; and that tax liability results.

It is therefore requested that the decision of the Supreme Court of South Carolina be affirmed.

Respectfully submitted,

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